Filed 9/22/06 Schindler v. Stutman CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JOHN SCHINDLER, Plaintiff and Appellant, v. DAVID STUTMAN et al., Defendants and Respondents.	B186696 (Los Angeles County Super. Ct. No. BC 268925)

APPEAL from a judgment of the Superior Court of Los Angeles County, Emilie Elias, Judge. Affirmed. Appeal from an order denying request for default judgment dismissed.

Tristram Buckley for Plaintiff and Appellant.

Tesser & Ruttenberg and Brian M. Grossman for Defendants and Respondents.

* * * * * *

After several unsuccessful attempts by appellant John Schindler, the trial court denied appellant's last request for the entry of a default judgment in excess of $16 million, and dismissed appellant's action for failure to bring it to trial in a timely fashion. We dismiss appellant's purported appeal from the denial of his request for a default judgment. In addressing the appeal from the order (judgment) of dismissal, we conclude that the trial court was correct in not entering the default judgment sought by appellant. Thus, we affirm the judgment.

INTRODUCTION

On June 25, 2005, appellant filed a request for the entry of a default judgment by the court against respondents David Stutman and Polo Pictures Entertainment, Inc. The request sought special damages in the amount of $4,027,868.65, general damages of $10 million, $2,212,577.65 interest, and $67,000 in attorney's fees, for a total award of $16,307,446.30. After taking into consideration appellant's submissions in support of this request, the trial court denied the request in its entirety on August 4, 2005. The trial court explained its ruling in a seven-page "statement of decision," which, among other things, made reference to a ruling by the court handed down on March 22, 2005, that also denied a request to enter a default judgment.

The statement of decision filed on August 4, 2005, closes by concluding that the court "also dismisses the case due to Schindler's unreasonable delay in obtaining a default judgment after multiple attempts. This action has been pending since February 2002, and Schindler has been aware of the problems with his default package since at least October 2003 when Judge Haley J. Fromholz[1] noted numerous deficiencies, yet Schindler continues to fail to remedy the default defects. In effect, Schindler has failed to bring the action to trial within a reasonable time period under Code of Civil Procedure sections 583.410 and 583.420, and the Court exercises its discretion to dismiss the action for failure to prosecute." A separate minute order entered

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1 The statement of decision filed on August 4, 1005, is signed by Judge Emilie H. Elias.

on August 4, 2005, references the statement of decision of the same date and states that the "action is dismissed this date." There is no indication that this minute order was served on any of the parties.[2]

On October 7, 2005, appellant filed a "notice of appeal" that states that appellant appeals to this court "from Orders of the Trial Court, wherein the Trial Court: Failed to enter judgment against the Defaulted Defendants; failed to grant Plaintiff's demands for a jury determination of the quantum of damages; *repteadedl* [*sic*] permitted ***nonparties*** to appear, present oral argument and submit pleadings and volumtes [*sic*] of documents in opposition to Plaintiff's request for entry of judgment on the Default, and over Plaintiff's strenuous objections; permitted ***defaulted Defendants*** to appear, present oral argument and submit pleadings and volumes of documents in opposition to Plaintiff's request for entry of judgment on these Defendants' defaults. [¶] The Trial Court improperly dismissed Plaintiff's action on August 4, 2005." (Italics and bolding in original.)

Appellant's opening brief advances six arguments, none of which addresses the order of the court dismissing the action for failing to comply with Code of Civil Procedure sections 583.410 and 583.420, i.e., for failing to bring the action to trial within a reasonable time. Thus, appellant's contentions are that the trial court erred in permitting the defaulted defendants, and nonparties, to appear in the "prove-up" proceedings; that the trial court should have referred the matter of damages to a jury; that appellant submitted more than adequate proofs of damages; and that the trial court should have sanctioned respondents for their unsuccessful motion to vacate their defaults.

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[2] The significance of this is that, given that there was no notice of entry of this order, the time to file the notice of appeal was 180 days from the date of the order. (*Hughey v. City of Hayward* (1994) 24 Cal.App.4th 206, 210.)

DISCUSSION

1. The Trial Court's Order Denying Appellant's Request To Enter a Default Judgment Is Not Appealable

The trial court's denial of appellant's request to enter a default judgment is not an appealable order.

"Under the basic theory of the one final judgment rule (see supra, §58), orders are appealable only when expressly made appealable by statute (see supra, §§96, 102 and infra, §127 et seq.), or when they are in effect final judgments (see supra, §§69 et seq., 102). [¶] The result is that there are relatively few appealable orders; the almost innumerable rulings, before and during trial, on pleadings, parties, evidence and trial procedure, are reviewable only on appeal from the judgment (see supra, §17), or, in rare cases, by extraordinary writ (see supra, §18). [Citations.]" (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 111, p. 177.) The denial of a request to enter a default judgment is not listed as an appealable order in Code of Civil Procedure section 904.1, subdivision (a), which lists orders that are appealable, nor is there a statute other than section 904.1, subdivision (a) that makes such a denial an appealable order. Apart from the lack of any statute that makes such an order appealable, the denial of a request to enter a default judgment is an interlocutory order, since the party requesting the entry of judgment can attempt to cure the defect(s) in its submission, and resubmit the request. Thus, the denial of appellant's request to enter a default judgment is not an appealable order. We therefore dismiss the purported appeal from that order.

2. The Appeal in This Case Is from the Order Dismissing Appellant's Action

Orders of dismissal have the effect of final judgments in terminating an action and are appealable as final judgments. (9 Witkin, Cal. Procedure, *supra*, Appeal, § 102, p. 165.) The statement of decision of August 4, 2005, signed by the trial court, complies with statutory requirements[3] and constitutes a proper entry of the judgment of dismissal.

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[3] Code of Civil Procedure section 581d provides in relevant part that "[a]ll dismissals ordered by the court shall be in the form of a written order signed by the court

Construing the notice of appeal liberally,[4] we deem the appeal to have been taken from the judgment (order) dismissing appellant's action.

3. No Abuse of Discretion Has Been Shown in the Dismissal of Appellant's Action

When, as here, the trial court has exercised its discretion in dismissing an action for failure to bring the action to trial, unless a clear case of abuse of discretion is shown and there has been a miscarriage of justice, the reviewing court will affirm the order. The burden is on the party claiming an abuse of discretion. (*Ladd v. Dart Equipment Corp.* (1991) 230 Cal.App.3d 1088, 1100.)

As noted, appellant has advanced no arguments, or reasons, why the trial court abused its discretion in dismissing the action. Absent a showing of abuse, the presumption applies that a judgment or order of the trial court is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Without more, this is enough to affirm the judgment.

4. Appellant Has Failed To Show That the Trial Court Erred in Denying the Request To Enter a Default Judgment

If the trial court had granted appellant's request to enter a default judgment, the action would not have been dismissed. Thus, it could be said that there is a connection between the denial of the request for a default judgment, and the dismissal of the action. For this reason, it appears to be appropriate to address the question whether the trial court erred in denying the request for a default judgment. It is also true that the interests of justice favor an examination of the merits of the trial court's denial of the entry of a default judgment, so that the matter is resolved on the merits, and put to rest.

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and filed in the action and those orders when so filed shall constitute judgments and be effective for all purposes, and the clerk shall note those judgments in the register of actions in the case."

[4] "The notice of appeal must be liberally construed." (Cal. Rules of Court, rule 1(a)(2).)

A significant obstacle in examining the merits of the trial court's order denying the request for a default judgment is appellant's failure to cite to the record, and his failure to provide an adequate record.

Notwithstanding the fact that the appendix filed by appellant is in six volumes and is 1,103 pages long, the account of the procedural history of this case, which is crucial in a case of this sort, occupies five pages in appellant's opening brief, and contains only three citations to the record, only one of which is to a matter of import. This is so, even though rule 14(a)(1)(C) of the California Rules of Court requires a brief to "support any reference to a matter in the record by a citation to the record."[5]

Illustrative of the obstacle posed by this is appellant's assertion at page 10 of the opening brief that the trial court, per Judge Fromholz, "entered the Defendants' defaults on July 8, 2003." There is no citation to the record. Thus, in a matter that is obviously critical to the entry of a default *judgment*, we do not have the document that constitutes the entry of a default, nor is it clear whether all of the defendants, or only some, were defaulted.[6] We surmise that, at a minimum, respondents were defaulted. (See fn. 6, *ante*.)

Appellant's account of the procedural history of the case goes on to refer to a motion for terminating sanctions, to an award of sanctions, to continuances of the motion for an entry of default, and to repeated failures of "defendants," which we assume refers to the respondents in this appeal, to appear. None of these assertions are supported by a reference to the record. We do not detail the balance of the factual and procedural assertions that are made in appellant's opening brief. Suffice it to say that they are just that, i.e., assertions, which we disregard because they are not supported by references to

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5 We observe for the guidance of counsel that this requirement is a cardinal rule of appellate practice, the importance of which has been frequently stressed by the courts. (See 9 Witkin, Cal. Procedure, *supra*, Appeal, § 589, p. 624.)

6 It appears from various filings in the record that, in addition to respondents, there were four other defendants and two intervenors.

the record. (*Prieto v. Loyola Marymount University* (2005) 132 Cal.App.4th 290, 292, fn. 1.) We are not required to search appellant's appendix, or the four-volume set of the respondent's appendix of 984 pages, for documents that might support appellant's assertions.[7]

Given the state of appellant's opening brief, and the state of the record, we are unable to address on the merits appellant's first contention that the trial court erred in allowing the "defaulted" defendants to appear, submit briefs, and present oral argument. Aside from citing generally applicable authorities, the extent of appellant's argument is that "the defaulted Defendants' pleadings, appearances and oral arguments in Opposition to Plaintiff's efforts to obtain judgment on their defaults were improper. [¶] The Trial Court's acceptance and consideration of such pleadings and arguments was improper." There is no citation to the record.

While a defaulted defendant's right to file pleadings, among other things, is cut off by the entry of a default (6 Witkin, Cal. Procedure, *supra*, Proceedings Without Trial, § 152, p. 569), we cannot determine if the error, if it occurred, was prejudicial since we are not informed what memoranda or pleadings were submitted by respondents. In this connection, we reject respondents' contention that they were entitled to file briefs because they had "direct interests in the controversy." Be that as it may, " '[t]he burden is on the appellant, not alone to show error, but to show injury from the error.' " (*Robbins v. Los Angeles Unified School Dist.* (1992) 3 Cal.App.4th 313, 318.) Appellant offers no explanation, or reason, why respondents' filings (whatever they were) were prejudicial. Even if we were inclined to excuse appellant from the burden of showing prejudice, which we are not, we could not independently assess if these filings were *prejudicial* error since we do not know what respondents actually filed.

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[7] An illustration of the defects in the record itself is that appellant did not include in his appendix the notice of appeal, at least in a manner that we could find it. We searched our own records for a copy of the notice of appeal.

Respondents inform us in their brief that actors Leonardo DiCaprio and Tobey Maguire were allowed to intervene but, when the court indicated that "they had no case to pursue," they dismissed their complaint in intervention. Appellant contends that the trial court erred in allowing DiCaprio and Maguire to present briefs and arguments relating to the request for a default judgment, since they were no longer parties to the action.

This argument fails for the same reasons as appellant's first contention. Appellant has not cited to the record where DiCaprio's and Maguire's submissions, if any, are to be found, nor has appellant given any reason(s) why these submissions were *prejudicial*. As noted, we are not required to search the record to find the documents that are basic to appellant's contention, nor will we presume that the error, if any, was prejudicial.

Appellant contends that he had a constitutional right to present his case to the jury, and that the court deprived him of that right when it denied his request for a default judgment. Appellant is mistaken. After the default was entered, there was no case to send to the jury. While Code of Civil Procedure section 585, subdivision (b) provides that the trial court, in entering a default judgment, may "order the damages to be assessed by a jury," this is a matter in the discretion of the trial court; the jury's finding is not binding, and the court has full powers to modify it. (*Cyrus v. Haveson* (1976) 65 Cal.App.3d 306, 318.) The evaluation and consideration of evidence presented in support of a default judgment is consigned to the trial court, not a jury.

Appellant contends that he presented sufficient evidence to make out a prima facie case for the entry of the judgment that he sought. Appellant points to 35 exhibits, 8 declarations, 13 invoices and a summary of damages in support of this contention.

In considering whether to enter a default judgment for the plaintiff, "[t]he correct standard of proof requires that the plaintiff merely establish a prima facie case." (*Johnson v. Stanhiser* (1999) 72 Cal.App.4th 357, 361.) "Generally speaking, the party who makes default thereby confesses the material allegations of the complaint. [Citation.] It is also true that *where a cause of action is stated* in the complaint and evidence is introduced to establish a prima facie case the trial court may not disregard the same, but must hear the evidence offered by the plaintiff and must render judgment in his

favor for such sum, not exceeding the amount stated in the complaint, or for such relief, not exceeding that demanded in the complaint, as appears from the evidence to be just." (*Taliaferro v. Davis* (1963) 216 Cal.App.2d 398, 408-409.) While only a prima facie case needs to be made, the showing of a prima facie case must be based on evidence.

The record reflects that appellant was afforded repeated opportunities to cure the defects in the "evidence" that he presented. On October 31, 2003, Judge Fromholz entered a two-page minute order in which he set forth the flaws in appellant's submission. As an example, the claim for $10 million in general damages was deemed to be speculative, not supported by a specific factual showing, and supported only by counsel's declaration that this was an appropriate amount. The minute order also noted that evidence of expenses and costs of production was inadequate.

While the minute order of October 31, 2003, was relatively short and to the point, a statement of decision dated March 22, 2005, and signed by Judge Elias, six pages long, is a detailed blue print for corrective action. This minute order commences with the general background of the case, which is that the case arises out of the production of a film entitled *Don's Plum*, that appellant allegedly wrote the script, provided the crew and shooting equipment, and directed and produced the film. Respondent Stutman allegedly promised to provide appellant participation in the profits, and undertook to distribute, and did distribute, the film overseas, but failed to pay appellant.

The March 22, 2005 statement of decision then reviewed the materials submitted by appellant. As far as the exhibits were concerned, the court found that they were not authenticated and that they lacked a foundation. The declarations that were submitted did not contain relevant information and, in the instance of appellant's own declaration, was conclusory, speculative and did not contain evidentiary facts. The minute order explained in detail why the claim of $10 million in general damages was defective, and why multiple items of alleged special damages needed to be supported by at least some evidence. The minute order closed by noting that appellant may be judicially estopped because in a related case, where the court had denied a petition to compel appellant to arbitrate his dispute over the film *Don's Plum*, appellant claimed he was an independent

contractor. In the instant case, however, appellant claims that he was a partner and joint venturer in the *Don's Plum* project.

This brings us to the statement of decision filed on August 4, 2005, which is the operative document that explains why the court denied the last request made by appellant for the entry of a default judgment, and why the court dismissed the case for failure to bring it to trial in a timely manner. We will refer to this statement of decision as the memorandum of decision (MoD) to distinguish it from the statement of decision filed on March 22.

Appellant's first contention regarding the MoD is that the trial court erred in disregarding appellant's, and his counsel's, declarations because these declarations were founded on hearsay. Appellant is mistaken in stating that the court disregarded these declarations because they were hearsay. The MoD states that appellant's declaration, which is the support for the claim of general damages of $10 million, doesn't mention the $10 million amount, nor does it supply any facts or explanation as to how appellant arrived at that amount. Appellant's declaration only states that appellant lost "millions of dollars and future employment opportunities" due to respondent Stutman's conduct and that the film "would have made at least $40 million in profits but for Stutman's conduct." The MoD concludes that these claims are "conclusory and speculative" and also constitute legal conclusions. We agree with the trial court.

Next, appellant contends that the trial court erred in disregarding invoices allegedly presented by appellant to Stutman. These alleged invoices total $627,868.65 and purportedly represent reimbursable expenses and production costs.

The trial court gave two reasons for rejecting these alleged invoices. First, the invoices state that payment is required " '[i]mmediately upon receipt of the first monies from the sale, licensing, or encumbrance of the movie.' " The MoD notes that the "problem is that [appellant] fails to include evidence showing that any money has been received from selling, licensing, or encumbering." The MoD reveals that three declarations, including appellant's, claim that respondent Stutman sold the movie in Asian territories for $200,000, but concludes that these statements are hearsay and lack

foundation. In any event, these statements do not state whether Stutman "has actually received money from the supposed sale." We think that the trial court's reasoning and conclusion on this matter are correct.

Second, the trial court found that these alleged invoices lack credibility in that they are undated and unsigned, and are not supported by documentation demonstrating payment to third party service providers. Appellant's somewhat implausible argument is that if "we go to McDonalds and buy a burger, to pay our bill, we need not know what McDonalds paid for the beef patty, the bread nor the pickles in order to be liable for the bill." The answer to this is that a film that allegedly generated $627,868.65 in production costs is not a McDonald's hamburger. Thus, we agree with the trial court that appellant's failure to attach invoices and/or receipts that show that appellant actually rented the equipment, and his failure to identify the entities from whom equipment was obtained, deprive the "invoices" of credibility. In the same vein, the trial court appropriately questioned the credibility of the "invoices" for the reason that these documents appeared for the first time in appellant's last request for entry of a default judgment, and were not included in his prior submissions, a matter that the trial court found to be "troubling" since the trial court had repeatedly and unsuccessfully requested such documents from appellant on prior occasions. Although the rule is that appellant needed to make only a prima facie showing of his damages, this rule does not require the trial court to suspend its reasoned judgment in evaluating the "evidence" submitted by appellant, or to cast common sense aside, both of which indicate that the "invoices" are not credible evidence.[8]

Appellant also contends that the trial court's conclusion that there was no showing that monies were actually received is "unsupportable." We have already noted that the trial court concluded that three declarations that claim that respondent Stutman sold the

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[8] The trial court also noted that several of the "invoices" do not reflect costs allegedly incurred by appellant, but rather credits received by appellant from third parties, which, unaccountably, appellant seeks to "recover" from respondents.

movie in Asian territories for $200,000 are based on hearsay and lack foundation and that these declarations do not state whether Stutman actually received any money from the alleged distribution of the film. Also troubling in this connection is appellant's claim that the film has generated "between $550,000 and $750,000," which is not only inexact but also at variance with the $200,000 estimate of the other declarations. Putting aside that appellant's figure is not supported by any evidence, no court can be expected to arrive at a figure when appellant's own submissions veer between $200,000 and $750,000.

We also agree with the trial court that appellant's lost profit participation of $3.4 million lacks any foundation in fact. The claim for $3.4 million is based on a projection that the film would have made at least $40 million. The $40 million figure is, according to the trial court, based on the factually unsupported claim of "a claimed senior vice president of an unidentified production company" whose "expertise" is nowhere shown.

We decline to address appellant's contention that the trial court should have sanctioned respondents for their unsuccessful motion to vacate their defaults. This argument has no conceivable relationship to the judgment of dismissal from which the appeal was taken, nor even to the court's denial of the default judgment.

Finally, we disregard the trial court's conclusion that judicial estoppel applies to this case since appellant has taken inconsistent positions on whether he was a partner/joint venturer or independent contractor in the film. This matter goes to the merits of the claim, which was not before the court after the default was entered. We note, however, that this inconsistency does nothing to instill confidence in appellant's claims.

In sum, we find that the trial court evaluated appellant's submission carefully and thoroughly. We also note that appellant had several opportunities to remedy the defects that led to the MoD filed on August 4, 2005, as well as the court's assistance and advice in preparing his submission. This suggests that appellant's final submission was the best that he could do. The trial court's analysis of that last submission was in all respects correct.

DISPOSITION

The appeal from the order denying appellant's request to enter a default judgment is dismissed. The judgment is affirmed. Respondent is to recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

FLIER, J.

We concur:

RUBIN, Acting P. J.

BOLAND, J.